Kurdish Studies
Jan 2024
Volume: 12, No: 1, pp. 2942-2951
ISSN: 2051-4883 (Print) | ISSN 2051-4891 (Online)
www.KurdishStudies.net

Received: October 2023 Accepted: December 2023
DOI: https://doi.org/10.58262/ks.v12i1.210

The Latin American International Agenda and the Recognition of Indigenous Rights. A Constitutional Paradigmatic Leap in Contemporary Ecuador

La Agenda Internacional Latinoamericana Y El Reconocimiento De Los Derechos Indígenas. Un Salto Paradigmático Constitucional En El Ecuador Contemporáneo

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Abstract

This research work analyzes a topic that, despite being little developed, has been gaining importance in nations known as plurinational, the respect and recognition of indigenous rights, in addition to their beliefs and ancestral knowledge. Several texts have been analyzed based on historical-bibliographic research to make known the arduous road that the indigenous people have traveled until reaching its summit with the recognition of their rights even in international instances. In this way, the issue of indigenous rights has been brought to the forefront of civil society and international instruments such as the Inter-American Commission on Human Rights, thus converting the States as entities of diversity before a millenary ancestral philosophical conception that is worthy of being recognized.

Keywords: *Integration, Indigenous Rights, Jurisdiction, Ancestral knowledge.*

Resumen

El presente trabajo investigativo analiza un tema poco desarrollado pero que ha venido tomando importancia en naciones gratamente conocidas como plurinacionales, el respeto y reconocimiento de los derechos indígenas, además de sus creencias y saberes ancestrales. Varios textos han sido analizados con base en una investigación de tipo histórico – bibliográfico para con ello dar a conocer el arduo camino que ha recorrido el pueblo indígena hasta llegar a su cumbre con el reconocimiento de sus derechos incluso en instancias internacionales. De esta manera se ha conseguido plasmar el tema de los derechos indígenas en la palestra de la sociedad civil e instrumentos internacionales como la Comisión Interamericana de Derechos Humanos, convirtiendo así a los Estados como entes de diversidad ante una concepción filosófica ancestral milenaria y digna de ser reconocida.

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Palabras Clave: *Integración, Derechos Indígenas, Jurisdicción, Saberes ancestrales.*

Introduction

In the history of the evolution of the rights of indigenous peoples, Convention 169 of the International Labor Organization (ILO) is the most developed international regulatory strategy in this field. Its postulates reveal a new conception in relation to the previous regulations (ILO Convention 107 of 1957), since its norms transform the idea of "integration", or indigenous "dissolution" with Western-rooted society, to crystallize a social novelty, the intercultural paradigm recognizing indigenous people as active subjects of a human collective called "people" as the best definition. (Sanchez, 2000)

It summarizes 3 compelling elements that make the ILO an essential paradigm that changed the history of Latin America and therefore Ecuador, with respect to the "indigenous question."

In the first instance, the concern of the ILO (International Labor Organization) to regulate indigenous peoples draws attention, and it is due to a logical situation: after the conquest, indigenous people are always classified as workers in precarious and vulnerable situations. That is why a normative reference point was necessary to regulate their position as workers. Regulating indigenous work is the basis for regulating other aspects. The great novelty of the ILO normative text is that the right to collective existence, cultural identity, and one's own institutionality, the right to participation, the right to internal self-determination appears under regulations; the right to the administration of justice, the collective right to possession and ownership of land, etc. (Barrero Tapias, 2018)

For the indigenous people, respect for authority and resolution of conflicts, making use of their unprecedented justice is established in articles 8, 9, and 10 of the Convention. According to critics, the right to administration of justice is provided to indigenous peoples according to unprecedented procedures, at the same time that the State must respect their decisions, without distinction of matter. This has been the debate table within not only Ecuador but all the States that have adopted this legal figure in Latin America. In addition to the intercultural interpretation and the form of sanction different from that of detention centers. (Aguirre, 2020)

Secondly, the State is forced to generate a consultative procedure for indigenous peoples, so that they have a voice and vote in the decisions that affect them. This regulation demonstrates to what extent, at least in legal theory, indigenous peoples acquire a different level that requires a structural reform of the State concerning this type of group at the international level.

Finally, it is necessary to evaluate the implications of Convention 169 and the series of difficulties that its ratification by States has encountered. Almost thirty years have passed since its genesis, but certain States still do not assimilate it and do not incorporate its regulations due to the distrust it generates in disproportionate consequences. (Martinez, Martinez, & Hernandez, 2018)

However, in 2007, after the approval of the United Nations Declaration on the Rights of Indigenous Peoples, the OAS tried to reach a consensus to establish key principles that make possible the intersection of indigenous rights that are increasingly solidified at the international level and the respective States that found internal difficulty in establishing a superior response to the declaration.

The Declaration on the Rights of Indigenous Peoples was approved in September 2007 at the

United Nations General Assembly. Although it is not binding on States, it is relevant in the current context of the discussion of indigenous rights. On the one hand, it insists on rights already established in ILO Convention 169 such as the Right to their own political, legal, and economic institutions, the right to consultation, to land, etc. (Tuaza, 2020)

It then surpasses Convention 169 with the appearance of other rights, such as self-determination; autonomy, and self-government, as well as, regarding the free and informed prior consent to which the State is obliged. This declaration was approved over a period of 30 years, becoming a true achievement for indigenous people. For Ecuador, this declaration is a milestone that has the category of foundation for the constitutionalization of Indigenous Rights and, above all, of the contemporary paradigm of indigenous justice. With all these virtues that are clearly favorable, it must also be noted a discussion that has often been a stumbling block in the political action of States that do not adhere to the deposit of the declaration, is that the declaration does not generate the same obligations as the agreement since it is not binding and depends entirely on the state's political will. (Garcia, 2020)

According to Regino Montes and Torres Cisneros, the advances that the declaration of the United Nations has with respect to the ILO Convention 169 on the indigenous issue are as follows:

1. There was active indigenous participation in the process of preparing the declaration, unlike the development carried out in ILO Convention 169. Indigenous participation legitimized the declaration through their active participation in the commissions.
2. Apart from strengthening ILO Convention 169, for the reaffirmation of already defined Indigenous Rights, something exceptional is the introduction of prior, free, and informed consent that far exceeds the sole forms of restricted and meager participation of Indigenous peoples. The declaration plans what was said in the Convention.
3. The annexation of self-determination is one of the most favorable elements for indigenous peoples. It is worth noting its prior recognition in the International Covenant on Civil and Political Rights, as well as in the International Covenant on Economic, Social and Cultural Rights; making it viable as a principle of the Declaration on the Rights of Indigenous Peoples elevates it to a fundamental category in the entire process of indigenous claims. (Regino Montes & Torres Cisneros, 2010)

In short, the international instruments analyzed carry out the effective recognition of indigenous rights, while forcing the signatory States to annex indigenous groups in most of their areas. So, there is no doubt that international conventions and the declaration are legal instruments with global impact, especially Latin American ones, with a recognition that had been cornered in the most remote corner of history. Hence it is a clear light to evolve towards a different State. The Ecuadorian indigenous sector has suspiciously taken advantage of this opportunity; Politically and legally, Ecuador has quickly assimilated the international instrument on the indigenous question and is currently walking under a paradigmatic constitutional configuration. (Jimenez, Viteri, & Mosquera, 2021)

Methods

The present research and analysis is bibliographic as the main methodology used, in such a way that emphasis is placed on the search, identification, and confirmation of both historical and contemporary sources. Using notes, books, scientific articles, records, and data classification, to highlight the bibliography and content used in the achievement of this work.

The work is essentially theoretical, and its starting point for research is the ongoing struggle

for the recognition and respect of indigenous worldviews. Throughout history, these worldviews were greatly diminished, especially concerning the rights of indigenous nationalities in Ecuador and the world. This has brought us to contemporary times, where their way of life, obscured by conquest and the republican era, is being appreciated. Furthermore, their persistent efforts to achieve cultural redemption and valorization are acknowledged, leading to the establishment of a multicultural and multiethnic state. Notably, indigenous justice, as a legitimate and functional legal system, now stands on par with the traditional legal system and plays a significant role in the humanization of contemporary law.

Through reasoning and the use of the deductive method as a process to obtain the necessary knowledge, the issue of indigenous rights is analyzed, from its almost eradication in times of colony and conquest, moving to a moment of mediation in unequal environments during the republican life and reaching its recognition not only socially, but also in the legal and therefore Constitutional field. A fact that contributes to the process of humanization of law. This research aims to identify elements that make it possible to present study results that allow the process to advance, whether doctrinally, legally, or jurisprudentially.

On the other hand, based on an Analytical-Synthetic method, a comprehensive review and examination of critical moments in the research are conducted. Likewise, the study commences with the decomposition of the object of study to examine each of these components individually. This approach facilitates the exploration of the causes, nature, and effects, enabling a broader assessment and a more comprehensive analysis of indigenous rights and justice.

Finally, in the research work, the objective is to achieve harmony between the ancestral knowledge of indigenous peoples, cultivated over remote and millennia-old times, and society in general. This extends to their rights and responsibilities, which are significant elements that have profoundly shaped the traditional legal perspective and have contributed to its humanizing and current legal trend.

Results

Recently in Latin America, reflection on the rights of indigenous groups has had a new state framework of reference, which demonstrates the partial or total renewal of States willing to include indigenous peoples in political protagonism. Despite the constitutional attempts to assume a true paradigmatic change in the States, having as a reference point a regulation that includes state "multiculturalism", the exaggerated use became an abuse of terms such as "multi" or "pluri", but without determining a clear application environment. (Gomez, 2022)

After exploiting the term “multiculturality” to the maximum, other concepts such as “interculturality” appeared, which, in the opinion of experts, were separated from neoliberal multicultural policies that were implemented during the 80s and 90s, disguised with made-up expressions, the same discrimination that was at the genesis of the States. In a certain way, the quality of life, the organization of power, and citizen participation preserved a racist spirit and, in the most favorable case, an undesirable paternalism. (Cruz Pérez, 2018)

In this way, the term multiculturalism was homologated with interculturality, the multilingualism that was present in the new definition of the State, while plurinationality was the hopeful term for a change in structure.

During the decades of the 80s and 90s, Latin American States revealed a range of words that are part of the legal language: Multiculturalism, interculturality, plurilingualism, and

plurinationality that in sum constitute an evolution of the state reality, sometimes without clearly specifying its meaning. For this reason, this research includes the clarification of terms that distinguish what is proposed when promoting changes in the constitutions also determined to radically change the States. (Toranzo, 2019)

Multiculturalism is the existence of several cultures coexisting in the same physical, geographic, or social space. Multiculturalism encompasses all the differences that are framed within culture, whether religious, linguistic, racial, ethnic, or gender. Multiculturalism recognizes the cultural diversity that exists in all areas and promotes the right to this diversity. (Sagastizabal, 2019)

In the context of the Latin American political and legal choice for multiculturalism, a range of reformist projects and initiatives are put forward to crystallize normative transformations in the constitutions of the member countries. These efforts are consistently funded by international cooperation organizations such as the IDB, the World Bank, and UNDP, which see this challenge as an irreversible matter in line with the political and socio-legal evolution of the time. (Poveda, 2017)

A curious fact is that the significance of the multicultural debate did not change the configuration of the liberal state at all. Including the paradigm of cultural diversity further strengthened the classical state model, its structure, organization, and power definition. There is no intention to alter the status quo; only minor adjustments are made to keep everything as it has always been. The traditional power groups are quietly strategic in preserving their interests, while the list of indigenous demands becomes increasingly substantial. The ancestral peoples will never be passive actors again; instead, they are devising strategies to engage with the states. These strategies include growing involvement in socio-economic development, collective organization, and significant political participation achievements, all of which have occurred under the influence of the concept of multiculturalism. (Delgado, 2019)

In this way, multiculturalism and its efforts can be considered a resolute decision that enables the inclusion of indigenous peoples in states that undoubtedly never previously embraced inclusive political strategies for their rights and demands. Nevertheless, despite the attention focused on indigenous issues, multiculturalism did not carry significant weight in achieving symmetrical cultures; instead, one culture prevails and sets the state agenda.

With all kinds of ups and downs, politically and legally, States assume the multicultural reality of their territories and begin to exploit the term with exaggeration through forums, projects, laws, and agreements, until they suffocate and exhaust it entirely, reducing its quality and applying it to any similar situation. Another undesirable consequence of multiculturalism that weakened their efforts is the openness not only to indigenous people but to all kinds of cultures which confuses and diminishes their intentions. (Matos, 2018)

With this understanding, we are referring to an ethnic and/or political concept that is based on the opening of the social contract (modern contractualism expressed in the Constitutional Charter) to differences that can be ethnic, gender-related, cultural, related to age, and so forth. In the case of Ecuador, the term "plurinationality" has been proposed by the indigenous movement to transcend the situation of racism, exclusion, and violence that characterizes the modern nation-state. It also creates conditions for integrating inclusive projects into the state.

State plurinationality is not an essential issue for indigenous peoples, but rather a modern political stipulation to create access, recognition, and interculturality for the entire society, but essentially for individual subjects and citizens.

A significant step forward proposed by the Latin American International Agenda in the recognition of indigenous rights is the concept of plurinationality, which carries a high level of political content. This transformation shifts from the cultural domain to integrate political aspects of collective actors. As observed, plurinationality surpasses the discussions recorded until now by breaking with the traditional notion that a state should correspond to a single nation. This shift bears strong political and legal implications. The idea of multiple nations implies fragmentation and, in the most extreme cases, state secession. In essence, it raises concerns about internal conflicts and continuous tensions. As a result, it was rejected not too long ago and continues to face opposition from certain sectors today. (Zhumi & Trelles, 2020)

The recognition of plurinationality in itself implies the concept of self-government and self-determination, but not the intention of independence. It is not only specified by international legal instruments but also by an established consensus that self-government has an unsuspected range of consequences (such as legal pluralism, policies, international peoples, etc.) that contradict the postulates and interests of modern States, which do not include the idea of separate States.

Discussion

The debates surrounding the relationship between the state and indigenous peoples reflect the actual evolution that has taken place throughout Latin America on a socio-political and legal level. The various terms associated with regulations, policies, and public agendas are reclaiming a dark and undesirable past. These mentioned transformations are not the result of a random political reinstatement that incidentally includes discussions about indigenous peoples, nor do they arise from the international choice to construct a "second decolonization." Instead, and above all, they result from the strong indigenous resistance that has gradually given rise to a new form of expression that corresponds to their way of life.

There is a great Latin American socio-legal challenge in recent decades that responds to the traditional monolithic and homogeneous State and is the real and effective inclusion of diversity, no longer in a superficial or folkloric way, but as a foundation that defines the modern state configuration.

If the term *recognize* is alluded to when beginning the reflection, the “norms of recognition” of indigenous rights crystallize an evident reality, becoming forceful tools to defend the rights of indigenous peoples. In such a way that regulations are the foundation that builds or structures the new State. Recognition is projected beyond its simple terminology, it includes the pre-existing genesis, analyzes the legitimacy of the demands, and establishes a continuous relationship with history.

Article 171 of the Ecuadorian Constitution of 2008 is the only regulatory body that recognizes “indigenous justice”, although in absolutely general terms. In short, it establishes:

1) “the authorities of the indigenous communities, peoples and nationalities will exercise jurisdictional functions”; 2) that they will do so “based on their ancestral traditions and their own right”; 3) only “within its territorial scope”; 4) “with a guarantee of women's participation and decision”; 5) that the indigenous authorities “will apply their own rules and procedures.” Regarding ancestry, there are historical problems, because of the periods of cultural evolution before the Inca, we know little or nothing about their justice, but only “for the solution of their internal conflicts”; 6) and, furthermore, provided that such rules and procedures are not

contrary to the Constitution and the human rights recognized in international instruments. (National Constituent Assembly, 2008)

The article adds that the State will guarantee respect for these decisions; that these, in any case, will be subject to constitutionality control; and, that the law will establish the coordination and cooperation mechanisms between the indigenous jurisdiction and the ordinary jurisdiction.

It is significant that through the act of recognition via the inclusion of specific constitutional provisions, national laws, or international treaties, the reality of collective rights, which can be attributed not to a single individual but to the indigenous community as a whole, is crystallized. These rights aim to establish the indigenous people as a collective subject and have the intention of breaking a historical chain of discrimination and abuse, motivating the new structure that replaces the "Nation-State" that paved the way for independence.

Two concepts that correlate and guarantee the coherence of the rights achieved by indigenous peoples: the pre-existence of indigenous peoples and the recognition of their rights; since no new developments are revealed, but rather it is stated that it already existed, before the generation of the State. These peoples already populated these territories, and the conquest broke out on them. Recognizing indigenous pre-existence in the national territory is the genesis for admitting other rights. These rights are not a concession donated by the State but on the contrary, they are rights that are concretized exactly in pre-existence, as witnessed by factual, legal, and political elements that necessarily surround the importance of the issue.

There is a permanent tension between normativism and the legitimacy of indigenous demands that are presented as a debate in the internal state forum between the approved legal norms that associate indigenous rights and the social and effective consensus that the indigenous person is in a position to be legitimized to be claimed for its territory, customs, worldview, etc. (Aldana & Isea, 2018)

A genuine historical reparation, one that is real in acknowledging indigenous rights as a response to the processes of indigenous extermination during the conquest and colonization, speaks of genuine legitimacy. Unveiling and respecting their rights translate into compensation for past abuses while sowing the seeds of a different historical future. The point of convergence between legality and legitimacy is clearly defined by collective rights expressed in constitutional norms. It is these very rights that establish the legitimacy of indigenous demands, as the collective prevails beyond individual rights.

In this regard, the act of recognizing indigenous people's territory, bilingual education, worldview, autonomy, etc., legitimizes the desire for these rights that have already been legally recognized. The interplay between legality and legitimacy is supremely necessary and important for Latin American indigenous peoples because it tends to create a gap in the execution of their rights. It's different to acknowledge and simultaneously respect what has been recognized. It is not reliable to have a range of constitutional rights, international agreements, secondary legislation, etc., that become inapplicable solely because of a lack of political will. It's about having and strengthening normative systems that precisely unveil the necessary rights, capable of renewing the state and implementing clear and distinct policies that give substance to concepts like interculturality and plurinationality.

Conclusions

The last constitutional cycle shines in the constitutions of Ecuador (2008) and Bolívar (2009):

The central theme is the qualitative leap in the historical-constitutional development, from multiculturalism and pluriculturality to the idea of plurinationality. That is, it is no longer a single nation with several ethnic groups, but rather several nations that inhabit the same state territory. The new constitutions are much more ambitious as they strengthen the rights and protection of indigenous peoples. For the first time, they aim to transcend the traditional state model and adopt a new model with different characteristics aligned with the indigenous reality, which legally appears paradigmatic in South America.

It is important to emphasize that, despite the very profound constitutional reforms, questions arise about how to effectively implement the rights of indigenous peoples. Both international agreements and reformed constitutions have revealed their ineffectiveness, even though they are considered a very significant evolutionary leap in the realization of these fundamental rights.

The essential question is whether constitutional transformations, with the same constitutional structure of the formation of the States, would be capable of generating radical transformations in the general order of the State with a traditional structure.

All the theoretical evolution expressed about the state and indigenous rights complicates the traditional liberal state framework. Transforming the constitutional paradigm and executing the ambition of constitutional norms, which represent not only the popular mandate but also the consensus of some peoples within the state, aligns with this complex challenge. It is advisable to consider exhortatory notes.

There is a disruption in the representative content compared to how it has been done until today. We are no longer dealing with strategies that need to be imposed on peoples with different cultural forms, languages, distinct legal systems, other interests, and other urgencies. The challenge is to create structures that facilitate the expression of various nations according to their unique ways of thinking and acting, allowing them to spontaneously interact under the same state alongside other peoples.

The desired constitutional projection is aimed at developing new constitutions that are separated from the Latin American constitutional tradition that is based on a single nation, to establish a new paradigm, according to which not only the participation of citizens (as isolated individuals) is provoked, but that of the indigenous collective. The last constitution of Ecuador applied this formula and was established with the intention, among others, of transforming the classic liberal matrix that ensures the rights of indigenous peoples, a process that has been full of obstacles. Perhaps it is too early to issue an evaluative verdict on the process since the Ecuadorian constitution is too young.

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